**FLORIDA PUBLIC SERVICE COMMISSION**

 **Fletcher Building**

 **101 East Gaines Street**

 **Tallahassee, Florida 32399-0850**

 **M E M O R A N D U M**

 **September 24, 1992**

**TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING**

**FROM: DIVISION OF APPEALS (MOORE)**

 **DIVISION OF LEGAL SERVICES (DAVIS)**

 **DIVISION OF RESEARCH & REGULATORY REVIEW (HOPPE)**

**RE: DOCKET 920840-0T - PROPOSED REVISION OF RULES 25-22.056, F.A.C., POST-HEARING FILINGS; 25-22.058, F.A.C., ORAL ARGUMENT; and ADOPTION OF RULE 25-22.0021, F.A.C., AGENDA CONFERENCE PARTICIPATION; TRANSFER OF PARTS OF RULE 25-22.057, F.A.C., RECOMMENDED ORDER, EXCEPTIONS, REPLIES, STAFF RECOMMENDATIONS, TO RULE 25-22.056, F.A.C; AND REPEAL OF RULE 25-22.057**

**AGENDA: 10/6/92 - CONTROVERSIAL - PARTIES MAY PARTICIPATE**

**RULE STATUS: PROPOSAL MAY BE DEFERRED**

**FILE NAME: I:\PSC\APP\WP\920840.RCM**

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 **CASE BACKGROUND**

 This item was deferred from the September 15, 1992 agenda so that staff could revise the rules in light of comments and concerns raised by Commissioners and interested persons. Rule 25-22.056(1)(d) has been revised to authorize the presiding officer to modify the page limit on post-hearing documents for good cause shown, and to increase the total page limit to 60. (Attachment, page 4). Rule 25-22.058(3), Oral Argument, has also been revised. (Attachment, page 9).

 **DISCUSSION OF ISSUES**

**ISSUE 1**: Should the Commission combine and revise Rules 25-22.056 and 25-22.057, relating to post-hearing procedures, and consolidate the oral argument and agenda conference provisions in separate rules on those subjects?

**RECOMMENDATION**: Yes. The Commission should revise its rules to improve and simplify post-hearing procedures.

**STAFF ANALYSIS**: Rule 25-22.057 prescribes post-hearing procedures when hearings are conducted by one Commissioner or Division of Administrative Hearings (DOAH) Hearing Officer. The procedures are cumbersome and, if the Commission follows them in staff-assisted rate cases, it is unable to meet the statutory time limits set forth in section 367.0814, Florida Statutes. In the past, and in lieu of the Rule 25-22.057 provisions, Commissioners have issued orders establishing post-hearing procedures modelled on the Division of Administrative Hearings (DOAH) rule (Rule 22I-6.031) and the Model Rules of Procedure (Rules 28-5.401 through 28-5.404, F.A.C.). See, Order No. 24856, Docket No. 900505-WS, In re: Application for a Staff-Assisted Rate Case in Bay County by Sandy Creek Utilities, Inc.

 Post-hearing procedures are also prescribed by Rule 25-22.056, leading to some confusion and duplication. The attached proposal addresses these problems. All post-hearing procedures for filing documents are combined into Rule 25-22.056 and Rule 25-22.057 is repealed. Certain sections apply to all hearings, and when a hearing is conducted by one Commissioner or a DOAH hearing officer, the sections addressing recommended orders and exceptions apply. Replies to exceptions are not authorized.

 Restrictions on the format and length of post-hearing pleadings are also imposed. These include a maximum length of 60 pages total for proposed findings of fact, conclusions of law, statement of issues and positions, and briefs; and margin and spacing requirements. The rationale for increasing the page limit from 50 (first version of revised rule) to 60 pages and for not having the statement of issues and positions in a separate document is to avoid duplication. If a party files a brief, the brief will argue the issues and therefore should contain a statement of the issues and a concise statement of the post-hearing position. A provision is added authorizing the presiding officer to modify the page limit for good cause shown.

 The revised rule provides that proposed findings of fact must cite to the record and, along with arguments, must be grouped by the issue to which they relate. In the past, post-hearing documents have not tracked the organization of the issues in the prehearing order, making it difficult to tie positions, arguments and proposed findings of fact to issues.

 The oral argument provisions of Rule 25-22.057 are repealed and a new section is added to the existing rule entitled "Oral Argument", Rule 25-22.058. The new section refers to section 120.58(1)(e), Florida Statutes, and requires requests for oral argument on recommended orders and exceptions to be filed no later than 10 days after exceptions are filed.

 The substance of the agenda conference participation provisions of Rule 25-22.057(5) is transferred to a new rule, Rule 25-22.0021, entitled "Agenda Conference Participation". The rule also authorizes participation of affected persons on items for which a hearing has not been held, except actions on interim rates in file and suspend rate cases or declaratory statements.

 An Economic Impact Statement (EIS) has not been prepared. Effective July 1, 1992, an EIS is not required if the rule will result in no substantial increases in costs or significant adverse effects to parties directly affected. (Attachment, page 11).

**ISSUE 2**: Should the rules be filed for adoption with the Secretary of State if no comments are filed?

**RECOMMENDATION**: Yes. If no comments are filed, the rule may be filed for adoption. The docket may then be closed.

**STAFF ANALYSIS**: The Commission is not required to offer the opportunity for a hearing on rules that relate exclusively to organization, procedure or practice. Section 120.54(3)(a), Florida Statutes. The Commission may act on the basis of comments alone, but if none are received, there is no need to return to agenda and the rule will be filed for adoption without change.

CTM/

Attachments

 25‑22.056 Post-Hearing Filings.

 (1) General Provisions.

 (a) If a hearing under section 120.57, F.S., is conducted by a panel of two or more Commissioners or the full Commission, all parties may submit proposed findings of fact, conclusions of law, ~~and recommended orders,~~ and ~~or~~ legal briefs on the issues within a time designated by the presiding officer.

 (b) If a hearing under section 120.57, F.S., is conducted by a Commissioner sitting as a hearing officer, all parties may submit proposed findings of fact, conclusions of law, proposed recommended orders, which shall include a statement of the issues, and exceptions, within the time and in the format designated by the presiding officer.

 (c) A party who fails to state or reaffirm a position on an issue to the presiding officer at the appropriate time shall be deemed to have waived that issue or position.

 (d) A party's proposed findings of fact, conclusions of law, statement of issues and positions, and brief shall together total no more than 60 pages and shall be filed at the same time. The presiding officer may modify the page limit for good cause shown. Lettering shall be distinct and in at least 11 point type. The text must be double spaced with 1-inch margins except for quoted material which may be indented and single spaced.

 (e) Requests for oral argument shall be filed in accordance with Rule 25-22.058, F.A.C.

 (2) Proposed Findings of Fact. A party may submit proposed findings of fact.~~, and~~ T~~t~~he presiding officer will rule upon each finding of fact ~~one~~, as required by section 120.59(2), F.S., when filed in conformance with this rule.

 (a) Proposed findings of fact shall be entitled as such, and must be presented on a document separate from all other post‑hearing documents ~~memoranda~~.

 (b) Each proposed finding of fact shall be separately stated, numbered consecutively, and shall be a succinct statement ~~may~~ not to exceed 3 sentences in length ~~be contained in extensive narrative form,~~ or contain mixed questions of fact and law. Each proposed finding of fact shall cite to the record, identifying transcript page and line. All proposed findings of fact which relate to a particular issue shall be grouped together and shall identify the issue number to which they relate. Any written statement that is not clearly designated as a proposed finding of fact shall be considered to be legal argument rather than proposed finding of fact.

 (3) Statement of issues and positions. In any proceeding where a prehearing order has been issued, and such prehearing order contains a statement of the issues as well as the positions of the parties thereon, all post‑hearing statements and other documents filed pursuant to this rule ~~memoranda~~ shall conform to the form and content of the statement of the issues and positions.

 (a) Each party to a proceeding shall file a post‑hearing statement of issues and positions which shall include a summary of each position of no more than 50 words, set off with asterisks. In the absence of such a summary statement, the prehearing position on that issue will be used in the staff recommendation. In the event that a new issue is identified by a party in a post‑hearing statement, that new issue shall be clearly identified as such, and a statement of position thereon shall be included. Any issue or position not included in a post‑hearing statement shall be considered waived. If a party's position has not changed since the issuance of the prehearing order, the party's post-hearing statement may simply restate the prehearing position.

 (b) A party is not required to file ~~a~~ post‑hearing documents ~~memorandum~~ in addition to the post‑hearing statement, unless otherwise required by the presiding officer. If a brief is filed, each argument must be identified by the issue number to which it relates. In the event that a party fails to file a post‑hearing statement in conformance with (3)(a), and no other post‑hearing memorandum is filed which conforms to this rule, that ~~a~~ party ~~so failing~~ shall have waived all issues and may be dismissed from the proceeding.

**[The following text has been transferred from Rule 25-22.057(1) through (3)(a). Rule 25-22.057 will be repealed. The text is underlined because it is new to this rule].**

 (4) Post-Hearing Filings When Hearing is Conducted by a Hearing Officer. If a hearing under section 120.57, F.S., is held before a Commissioner sitting as a hearing officer, the following provisions shall apply in addition to (1)(b) through (3) of this rule. Subsection (b) of the following provisions also applies when the hearing has been conducted by the Division of Administrative Hearings.

 (a) Recommended Order. The presiding officer shall, within 30 days after the hearing or receipt of the hearing transcript, whichever is later, file a recommended order which shall include a caption, time and place of hearing, appearances entered at the hearing, statement of the issues, findings of fact and conclusions of law, separately stated, and recommendation for final Commission action.

 (b) Exceptions. Parties and staff may file exceptions to the recommended order with the Division of Records and Reporting within 14 days of service of the recommended order, and shall serve copies of any such exceptions upon all parties of record and staff. Such exceptions shall fully set forth the error claimed and the basis in law and fact therefore, with exceptions to findings of fact supported by citations to the record. A party's failure to serve or file timely written exceptions shall constitute a waiver of any objections to the recommended order.

Specific Authority: 120.53(1), F.S.

Law Implemented: 120.53, 120.57, 120.58, F.S.

History: New 12/21/81, formerly 25‑22.57, Amended \_\_\_\_\_\_\_\_.

25‑22.057 Recommended Order, Exceptions, Replies, Staff Recommendations.

Specific Authority: 120.53, F.S.

Law Implemented: 120.53, F.S.

History: New 12/21/81, formerly 25‑22.57, Repealed .

25‑22.058 Oral Argument.

 (1) The Commission may grant oral argument upon request of any party to a section 120.57, F.S. formal hearing. A request for oral argument shall be contained on a separate document and must accompany the pleading upon which argument is requested. The request shall state with particularity why oral argument would aid the Commission in comprehending and evaluating the issues before it ~~raised by exceptions or responses~~. Failure to file a timely request for oral argument shall constitute waiver thereof.

 (2) If granted, oral argument shall be conducted at a time and place determined by the Commission. Unless otherwise specified in the notice, oral argument shall be limited to 15 minutes to each party. The staff attorney may participate in oral argument.

 (3) Requests for oral argument on recommended orders and exceptions pursuant to section 120.58(1)(e), F.S., must be filed no later than 10 days after exceptions are filed.

Specific Authority: 120.53, F.S.

Law Implemented: 120.53, 120.58(1)(e), F.S.

History: New 12/21/81, formerly 25‑22.58, Amended \_\_\_\_\_\_\_\_\_\_\_\_.

25-22.0021 Agenda Conference Participation.

 (1) Persons who may be affected by Commission action on certain items on the agenda for which a hearing has not been held (other than actions on interim rates in file and suspend rate cases and declaratory statements) will be allowed to address the Commission concerning those items when taken up for discussion at the conference.

 (2) When a recommendation is presented and considered in a proceeding where a hearing has been held, no person other than staff who did not testify at the hearing and the Commissioners may participate at the agenda conference. Oral presentation by any other person, whether by way of objection, comment, or otherwise, is not permitted.

 (3) Nothing in this rule shall preclude the Commission from taking action during the course of a hearing or other duly noticed proceeding.

Specific Authority: 120.53, F.S.

Law Implemented: 120.53, F.S.

History: New